

ARTICLE XIII

TELECOMMUNICATIONS RIGHTS-OF-WAY BY-LAW

I. PREAMBLE

In partial fulfillment of the obligation to see to the prudent management of the Town's affairs and assets and in light of the continuing technological revolution in telecommunications, passage of the Telecommunications Act of 1996 and de-regulation of the electric and natural gas industries in the Commonwealth, the Town hereby establishes a comprehensive, non-discriminatory, and fair system of regulation for all entities which desire to use the Town's Rights-of-Way.

This by-law is adopted in accordance with the authority granted, inter alia, by Amendment Article 89 to Article II of the Massachusetts Constitution, M.G.L. Chapter 43B section 13, M.G.L. Chapter 40 sections 4, 21 and 22F, and Chapter 85.

II. INTRODUCTION

The purpose and intent of this By-Law is to:

- a. Provide the Town with accurate and current information concerning all facilities located in the Town's Rights-of-Way together with current information concerning entities owning or controlling the Facilities, and
- b. Permit and manage reasonable access to the public Rights-of-Way on a competitively neutral basis, and
- c. Manage Grants of Location in Public Ways, and
- d. Conserve the limited physical capacity of the Rights-of-Way held in public trust by the Town, and
- e. Assure that the Town is appropriately compensated when its Rights-of-Ways are utilized by non-governmental entities, and
- f. Assure that the Town's current and on-going costs of granting and regulating private access to and use of the public Right-of-Way are fully paid by the persons seeking such access and causing such costs, and
- g. Assure that the Town can continue to fairly and responsibly protect the public health, safety and welfare.

III. DEFINITIONS

Applicant: Any person or entity, including without limitation implied, Public Utility, Telecommunications Carrier, Local Exchange Carrier or municipal department that owns or exercises general responsibility and control over any Facility.

Application: The written application on a form prescribed by the Awarding Authority with any required documentation and the application fee by which an Applicant or Co-Locator requests a Right-of-Way Permit.

Application Fee: A non-refundable processing fee which shall accompany each application for a Right-of-Way Permit. The application fee shall be in the amount set forth by separate action by the Board of Selectmen.

Attachment: Any device, apparatus, appliance, equipment, wire or cable or other thing including any Telecommunication Facility installed or proposed to be installed on or in any existing facility whether by Applicant or Co-Locator or proposed to be installed on any new facility by Applicant or Co-Locator.

Awarding Authority: The Board of Selectmen of the Town of South Hadley which has authority to exercise the powers granted by this By-Law.

Contractor: All officers or employees of Applicant or Co-Locator who perform or any person or entity engaged by or on behalf of Applicant or Co-Locator to perform construction, repair or maintenance work on overhead or underground facilities owned by Applicant and permitted by the Awarding Authority which are located in the Right-of-Way. The contractor for purposes of this By-Law and for all questions of liability in connection with any construction, repair, or maintenance work on overhead or underground facilities owned by Applicant, which are located in the Right-of-Way shall be conclusively deemed an agent of Applicant or Co-Locator for whom Applicant or Co-Locator is fully responsible.

Default: The failure of the permit holder (including all contractors or other agents of permit holder) (i) to pay when due any license rental, (ii) to perform fully any covenant of the license or otherwise fail to comply with any provision of the license agreement, the Right-of-Way Permit or the By-Law following ten days prior written notice to Licensee from Town (iii) to keep its Certificate of Insurance in full force and effect, or (iv) to provide the service that is outlined in its Application (except for interruptions in service due to emergency repair Work) for a period of six consecutive months.

DTE: The Massachusetts Department of Telecommunications and Energy created by Chapter 25 M.G.L.

Effective Date: The date upon which this By-Law becomes effective.

Emergency Repair Work: Right-of-Way work which must be commenced immediately to correct a hazardous condition in which the safety of the public is in imminent danger, such as a threat to life or health of the public or where immediate correction is required to maintain or restore essential public utility service.

Excess Capacity: The volume or capacity in any existing facility that is not being used or is not proposed to be used as part of a concrete plan for the future at the time that an application is made for a Right-of-Way Permit by an Applicant or Co-Locator.

Existing Facility: An overhead or underground facility in existence on the date of the Application for a Right-of-Way Permit.

Facility: Any overhead or underground facility or attachment thereto including without limitation any utility or other pipe, duct, line, pole, wire, cable, transmission line, conduit, pedestal, wave guide, dish, antenna, electronic or other thing located or proposed to be located in, on, above, along, under or across a Right-of-Way.

FCC: Federal Communications Commission.

Grandfathered Facility: An overhead or underground facility in existence on the effective date.

Grant of Location: Permission granted by the Awarding Authority of the Town to a public utility, in order to conduct its regulated activities, to locate poles, piers, abutments or conduits or attachments thereto or railway routes on, in, above, along, under or across a Public Way in accordance with the procedures set out in M.G.L. Chapter 166 section 22, Chapter 161 section 70, Chapter 162 section 8 and with this By-Law.

Grant of Location Applicant: An Applicant or Co-Locator which is a public utility conducting a business described in section 21 of Chapter 166 of the Massachusetts General Laws.

Highway Superintendent: That individual, appointed or elected in accordance with Chapter 41, sections 1, 66 or 69E of the M.G.L.

Inspector of Wires: That individual appointed by the Town to fulfill the responsibilities set out in M.G.L. Chapter 166 section 32.

License Agreement: An agreement between the Town and an applicant owner of a facility setting forth detailed contractual terms and obligations of the owner of a facility and entered into incident to the grant of a Right-of-Way Permit.

Licensed Contractor: A contractor authorized by the Awarding Authority as a provision of the license agreement with the Applicant to undertake work in the Town Right-of-Way.

Local Exchange Carrier: Every person or entity that directly or indirectly owns, controls, operates and manages plant, equipment or property within the Town used or to be used for the purpose of offering telephone service and which is licensed by the FCC and certified by the DTE under C. 159 M.G.L. as a local exchange carrier.

Measurable Interference: Interference as defined by FCC Regulations (47 C.F.R.) which affects the telecommunications services provided by a permit holder.

Modification: A material physical change to an existing facility such that its use or capacity is materially altered.

Network: All public and private poles, towers, transmitters, receivers, relay devices, conduits, pipelines, cables, wires, ducts, structures, manholes, hand holes, and related structures and equipment, which are sited in a public way or a public right-of-way or any part of a public way or public right-of-way and which are used for telecommunications services.

New Facility: An overhead or underground facility or an attachment that has not yet been constructed but that is proposed and described in an application for a Right-of-Way Permit.

Normal Working Hours: 7:30 a.m. to 4:30 p.m. Monday through Friday excluding Town holidays.

Occupied Area: The area in square feet to be occupied by an overhead facility (including space adjacent to the facility and rendered practically unusable by others whether because of physical limitations or potential measurable interference or otherwise) all as reasonably determined by the Awarding Authority. In the case of pole lines, for the purposes of computing square feet, the width dimension generally shall be determined with reference to the maximum distance that protuberances such as crossarms, guy wires, etc. extend perpendicularly from the center-line of the poles. Also included in the license for a pole and at no additional rental, is the right to penetrate the surface of the Right-of-Way to the depth reasonably necessary to support the pole.

Occupied Volume: The volume measured in cubic feet occupied by an underground facility (including space adjacent to the facility rendered practically unusable by others whether because of physical limitations or potential measurable interference or otherwise) all as reasonably determined by the Awarding Authority.

Overhead Facility: Any tower, telecommunication facility and pole including poles and overhead wires and associated overhead structures including attachments located or proposed to be located above the surface of the Right-of-Way including the underground supports and foundations for such facilities.

Overhead License Rental Payment: The annual dollar amount to be paid by an Applicant to the Town for using the Right-of-Way for an overhead facility.

Overhead License Rental Rate: Shall have the meaning subscribed to it and shall be computed annually as set out in Section VIII A of this By-Law.

Permit Holder: An Applicant or Co-Locator to whom a Right-of-Way Permit has been granted.

Permit Term: The period for which the permit holder has been granted a Right-of-Way Permit. Said period shall be as set forth in Section VII of this By-Law.

Planning Board: The Planning Board of the Town of South Hadley.

Pole or Poles and Overhead Wires and Associated Overhead Structures: poles, towers, supports, wires, conductors, guys, stubs, platforms, crossarms, braces, transformers, insulators, cut-outs, switches, communication circuits, appliances attachments, and appurtenances located above ground, upon, along or across any Public Way or private ways of the Town and used or useful in the transmission of intelligence by electricity or otherwise, or for the transmission of television signals, whether by electricity or otherwise, or for the transmission of electricity for lighting, heating or power, or for the construction or operation of a street railway or an electric railroad;

provided, that said phrase shall not mean or include any of the following:

- a.) poles, towers, overhead wires and associated overhead structures used exclusively in the transmission but not the distribution of electricity;
- b.) poles used exclusively for police and fire alarm boxes or any similar municipal equipment installed under the supervision and to the satisfaction of the engineer of the municipality;
- c.) wires (exclusive of supporting structures) crossing any portion of any underground utility district from which overhead wires have been prohibited, or connecting to buildings on the perimeter of such portion, when such wires originate in an area from which poles and overhead wires and associated overhead structures are not prohibited;
- d.) overhead wires attached to the exterior surface of a building by means of a bracket or other fixture and extending from one location on the same building or to an adjacent building without crossing any public Right-of-Way;
- e.) radio antennae, their associate equipment and supporting structures used by a utility for furnishing communication services; and

f.) service terminals including transformers in pedestals above ground used to distribute electric or communication service in underground systems.

Pole Attachment: An attachment which is a wire or cable for transmission of intelligence by telegraph, telephone or television, including cable television, or for the transmission of electricity for light, heat, or power or for the transmission of telecommunications services and any related device, apparatus, appliance or equipment installed upon any pole or in any telegraph duct or conduit owned or controlled in whole or in part by one or more public utility.

Public Utility: A gas and electric company subject to M.G.L. Chapter 164, telephone and telegraph company subject to M.G.L. Chapter 166, cable TV company subject to M.G.L. Chapter 166A, water and aqueduct company subject to M.G.L. Chapter 165, or street railway subject to M.G.L. Chapter 161 or electric railroad subject to M.G.L. 162.

Public Utility Use: The use of a facility by a public utility during the permit term in conducting its regulated activities but not including any non-public utility use by such public utility or any use by a non-regulated affiliate of a public utility or any other use by any other person or entity.

Public Way: Any road (including such appurtenances as berms, curbs, drains, sewers, water mains, sidewalks and paved and unpaved shoulders within the paper layout) to which the public has access and that the Town is responsible for maintaining.

Public Works Construction License: A license or authorization granted by the Awarding Authority as a provision of the license agreement with the Applicant for all Contractors (who are not officers or employees of a public utility or of a municipal department) to perform road opening work in the Public Ways of the Town.

Regulated Activities (of Public Utilities): The transmission of natural gas and electricity by a gas or electric company subject to M.G.L. Chapter 164, the transmission of voice or telegraph messages by a telephone and telegraph company subject to M.G.L. Chapter 166, the transmission of video broadcasts by television or cable television (including other activities deemed incidental thereto by federal law) subject to M.G.L. Chapter 166A, the provision of street railway services subject to M.G.L. Chapter 161 or transportation by electric railroad subject to M.G.L. Chapter 162.

Right-of-Way: The surface and space on, along, above and below any real property which is a Public Way or other way in which the Town has an interest in law or equity, whether held in fee or other estate or interest, or as trustee for the public, including, but not limited to any public street, boulevard, road, highway, freeway,

lane, alley, court, sidewalk, parkway, river, tunnel, viaduct, bridge, park, skyway, or skyway bridge.

Right-of-Way Permit: A permit granted by the Awarding Authority to an Applicant for permission to construct, to repair and maintain, and to use overhead and underground facilities that it owns and which are located or to be located in the Right-of-Way. Also a permit granted by the Awarding Authority to a Co-Locator for an attachment to a new or existing facility.

Right-of-Way Work: Any construction, repair or maintenance of utility or other pipes, ducts, lines, poles, wires, cables, conduits, pedestals, antennas, dishes, electronics or other thing located in, on, above, under or across a Right-of-Way.

Street Opening Work: Any cutting, excavating, compacting, construction, repair or other disturbance within or under a Public Way together with restoration of the Public Way in accordance with the Town DPW Road Opening Permit Process following such disturbance but excluding the location or relocation of utility poles for which a Grant of Location has been obtained pursuant to M.G.L. Chapter 166 section 22.

Telecommunications: The transmission between or among points specified by the user of information of the user's choosing without change in the form or content of the information as sent and received.

Telecommunications Carrier: Every person or entity that directly or indirectly owns, controls, operates or manages plant, equipment or property within the town used or to be used for the purpose of offering telecommunications service and which is licensed by the FCC and certified by the DTE under C.159 M.G.L. as a telecommunications common carrier.

Telecommunications Facility: A facility other than customer premises equipment used by a telecommunications carrier to provide telecommunications service and includes software integral to such equipment (including upgrades), cables, wires, lines, wave guides, electronics, dishes and antennas.

Telecommunications Service: The offering of telecommunications for a fee directly to the public or to such classes of users as to be effectively available directly to the public regardless of the telecommunications facilities used.

The Telecommunications Act of 1996: Public Law 104-104-Feb. 8, 1996. 110 Stat. 57.

Town: The Town of South Hadley.

Transmission Line: Lines and associated structures used for the transmission of electric energy sold, or to be sold, at wholesale in interstate commerce.

Underground Facility: Any pipe, duct, line and conduit and telecommunications facility or other thing including attachments located or proposed to be located under the surface of the ground but excluding the underground foundations or supports for overhead facilities.

Underground License Rental Payment: The annual dollar amount to be paid by an Applicant for use of the Right-of-Way for an underground facility.

Underground License Rental Rate: Shall have the meaning subscribed to it and shall be computed annually as set out in Paragraph VIII B of this By-Law.

Usable Space: The total usable capacity of any overhead or underground facility located in the Right-of-Way as reasonably determined by the Awarding Authority.

IV. NECESSITY OF A PERMIT

No work in, on, under, along, above or across a Right-of-Way or use of a Right-of-Way shall commence until the Applicant and any Co-Locator each shall have applied for and obtained from the Awarding Authority a Right-of-Way Permit. Applicants with grandfathered facilities and any Co-Locator with grandfathered facilities located in the Right-of-Way shall be deemed to have applied for and been granted a valid Right-of-Way Permit for the permit term for such facilities and to be subject to all of the provisions of the license agreement substantially in such format as the Awarding Authority might deem appropriate.

An Applicant or Co-Locator which wishes to continue to use a grandfathered facility after the expiration of the permit term each must file an Application and treat such facility as a new facility. From and after the effective date, Applicant or Co-Locator must also obtain a Right-of-Way Permit for any modification of or new attachment to a grandfathered facility.

Any Applicant or Co-Locator using a grandfathered facility for any purpose other than a public utility use must notify the Town of such use of each such facility within 120 days after the effective date. Any Applicant or Co-Locator which after the effective date wishes to make a use of its grandfathered facility which is not a public utility use must, prior to commencing such use, apply for and obtain a Right-of-Way Permit for such non-public utility use.

Traffic lights, fire hydrants, mail boxes and similar intrusions in the Right-of-Way that are accessory uses to the primary use of the property such as awnings, balconies, over-hanging signs and sidewalk cafes are exempted from this By-Law.

Prior to the Town accepting a private way as a Public Way, such Applicant with a facility located in, on, under or across the private way and each Co-Locator using

such facility including a Co-Locator Public Utility shall apply for and obtain a Right-of-Way Permit from the Awarding Authority.

A public utility that is petitioning for a Grant of Location in accordance with Ch. 166 section 22, Ch. 161 section 70, or Ch. 162 section 8 of the M.G.L. as part of its Application for a Right-of-Way Permit shall so indicate on the Application. A Right-of-Way Permit granted to a public utility for a facility to the extent of public utility use shall constitute a Grant of Location as well.

No Right-of-Way Permit shall be granted unless Applicant demonstrates to the reasonable satisfaction of the Awarding Authority that sufficient existing capacity remains in existing facilities to accommodate an attachment or that Applicant will construct new facilities in accordance with the requirements of this By-Law. Except for transmission lines, in the event that all of the usable space of existing overhead facilities has been used up, the Town may in its reasonable discretion require that the Applicant construct new underground facilities.

All construction work contemplated by this By-Law shall be done in a good and workmanlike manner using the best engineering and construction practices and shall be done in accordance with (i) all applicable laws and regulations, (ii) all of the provisions of this By-Law, (iii) any conditions contained in the Right-of-Way Permit, and (iv) such reasonable supplemental instructions not inconsistent with the foregoing as the Awarding Authority or its authorized representative may from time to time issue. Work that involves road opening activity must comply with the Town Department of Public Works' Road Opening Permit Procedures. Applicants proposing road opening activity must contact and consult with the Town's Superintendent of Public Works regarding further information and requirements.

No person or entity may perform any work in or under a Right-of-Way unless it is a permit holder and (i) is a municipal department, public utility, telecommunications carrier or local exchange carrier or their respective officers or employees or (ii) has engaged a licensed contractor and such holder performs all such Right-of-Way Work as agent of permit holder.

V. REQUIREMENTS OF APPLICATION

A. Information Required of All Applicants and Co-Locators

Applicants or Co-Locators seeking a Right-of-Way Permit shall file on forms designated by the Awarding Authority a completed and signed Application at the office of the Awarding Authority which shall include the following information:

1. The identity and legal status of the Applicant or Co-Locator including any parent or affiliated corporation.
2. The address and telephone number of the corporation and the name of the officer, agent or employee responsible for the accuracy of the Application.

3. If a public utility (or municipal department), the federal identification number of the entity. All others must in addition specify their FCC license number and submit evidence of certification by the DTE.
4. A general description of Applicant's existing overhead or underground facilities within the Town that it is using to provide service and the service that it is currently providing.
5. A detailed description of the service that Applicant or Co-Locator intends to offer or provide to persons, forms, businesses or institutions within the Town and whether the use of the facility to provide the service will constitute a public utility use.
6. A detailed description of the underground or overhead facilities Applicant or Co-Locator intends to use or construct, their useful life and full dimensions of the proposed facility including but not limited to the following: height of poles, number of wires and their diameter, height of wires above the Right-of-Way, voltage of electric transmission lines, diameter of mains and conduits.
7. Maps or plans showing the exact location of the existing or proposed new facility in the Right-of-Way using engineering metes and bounds, street names and intersecting street names. All maps and plans must show a north arrow and include a Locus Map at an appropriate scale (1-inch equals 400 feet is the preferred scale). A copy of the maps and plans must be provided in an appropriate digital format as specified by the Awarding Authority.
8. A statement as to whether new facilities will be built or existing facilities will be used and who is the Applicant with respect to such facility.
9. In the case of a Co-Locator seeking a permit for an attachment to a facility, the Applicant of which is exempt in whole or part from the obligation to make annual license rental payment for the facility as provided herein, such application shall be made jointly by Applicant and Co-Locator. Each must sign the application and Applicant must acknowledge in writing in form and substance satisfactory to the Town, its obligation to pay the amount, if any, of annual license rental payment due the Town in respect of such attachment.
10. The names of Co-Locators who share or will share the facility. Applicants must provide evidence that Co-Locators have received their own Right-of-Way Permit and identify all pending Co-Locator Application.
11. Evidence that Applicant or Co-Locator has obtained all other governmental approvals and permits needed to use existing facilities and to offer or provide services.

B. Petitions for Grants of Location

Applicants or Co-Locators that are public utilities and that are seeking a Grant of Location as part of the Right-of-Way Permit shall also provide the following information as part of the application:

1. A statement as to the demonstrated need to construct the new facility or make an attachment to an existing facility.
2. A list of abutters' names and addresses.
3. The kind, size and tested strength of supporting or service wires for poles.
4. The maximum voltage that will be transmitted over wires and the maximum cubic feet of gas that will be transported through mains.
5. The size and pressure of gas mains and what the main is made of.
6. A list of all posts, poles or other supports of wires included in the Grant of Location.
7. The number of cross arms in use with each pole and the number of wires that are already attached thereto and the number of wires that are proposed.
8. The location of conduits and manholes in relation to the existing underground facilities and proposed new underground facilities.

C. Applications for New Facilities - Supplemental Information Required.

If new facilities are to be constructed, Applicant must submit the following additional information as part of the Application:

1. Preliminary engineering plans, specifications and a Site Plan of the facilities to be located within the Right-of-Way at a scale of one inch equals forty (40) feet which shall show (i) all property lines, (ii) the exact location of the proposed new facilities, and (iii) existing facilities, streets, landscape features, residential dwellings, and all buildings located within five hundred feet (500') of the new facility prepared by a Professional Engineer registered to perform the required work in the Commonwealth of Massachusetts or other qualified professional registered to perform the required work in the Commonwealth of Massachusetts.
2. A network map showing the location and route of the new facilities superimposed on the Public Ways of the Town on a scale of one inch equals two-hundred feet prepared by a Professional Engineer registered to perform the required work in the Commonwealth of Massachusetts or other qualified professional registered to perform the required work in the Commonwealth of Massachusetts. The Awarding Authority may permit an alternate scale if unique circumstances warrant an alternate scale and scale of the map permits adequate conveyance of the information depicted.
3. A copy of the maps and plans must be provided in an appropriate digital format as specified by the Awarding Authority.
4. The location of all existing facilities located along the proposed route.
5. The specific trees, structures, improvements, facilities and obstructions, if any, that Applicant proposes to temporarily or permanently remove or relocate.
6. Evidence as to what, if any, excess capacity is available for attachment to existing facilities located along the proposed route with a specification of how much excess capacity will exist after the installation of the new facility. If co-location is not proposed, an affidavit attesting to the fact that Applicant made diligent but unsuccessful efforts to obtain permission to install or co-locate

- new facilities on existing facilities, the reason for the denial of co-location and whether an appeal to the DTE has been adjudicated.
7. If new facilities are to be constructed, the excess capacity that will exist in or on them after their installation and use by the Applicant and any identified Co-Locator.
 8. The useful life of the proposed facility or attachment.
 9. Information as to the type and frequency of any telecommunications equipment that will be installed.
 10. A preliminary construction schedule and completion date.
 11. Financial statements prepared in accordance with generally accepted accounting principles demonstrating Applicant's financial ability to construct, operate, maintain, relocate and remove the proposed Facilities.
 12. Information in sufficient detail to establish Applicant's technical qualifications, experience and expertise regarding the facilities to be constructed and operated.
 13. Evidence that Applicant has obtained all other governmental approvals and permits needed to construct the new facilities.
 14. The name of the licensed contractor who will perform the construction work.
 15. An application fee.
 16. A Certificate of Insurance in coverages as specified in Section VII-J of this By-Law.
 17. Such other information as may be reasonably required by the Awarding Authority.

D. Number of Copies Applications Required.

Applicants must submit at least seven (7) copies of ALL application materials.

VI. APPLICATION PROCEDURE

A. Departmental Reviews Required. Upon receipt of a completed and signed Application, the Awarding Authority shall submit the application and associated plans to the South Hadley Electric Light Department, Conservation Commission, DPW Superintendent, Planning Board and the Inspector of Wires (hereafter referred to as "the departments") for review. The departments shall promptly review the Application and make written recommendations concerning approval to the Awarding Authority and, if appropriate, shall include recommendations concerning permit conditions and supplemental instructions. The departments requested to review the application and plans shall submit their comments within thirty-five (35) days of the date of Application. Failure to respond within his time frame shall be deemed as having no objection to the application. The Awarding Authority shall not act on any application until the thirty-five day period for departmental reviews has lapsed.

B. Application and Review Fees. The Applicant, as part of the filing of an Application, shall pay such application fees as established by the Board of

Selectmen. Further, the Applicant shall be responsible for any and all expenses associated with giving notice of a public hearing if any such hearing is required. Further, if the application involves the construction of new facilities, the modification of existing facilities or a program of attachments the total construction cost of any of the foregoing is estimated to exceed one million dollars, the Town may require the Applicant to enter into an agreement with the Town to reimburse the Town for the reasonable cost of engineering review by the Town's consultant of the plans submitted. Applicants shall submit a deposit to secure the cost of this review.

C. Grant of Location Public Hearing. If the Right-of-Way Application includes a Petition of the Applicant for a Grant of Location, the Awarding Authority shall promptly schedule a public hearing to be held within sixty-five (65) days of the date of application.

Notice of the public hearing shall be published in a newspaper of general circulation in the Town of South Hadley. Further notice shall be posted in the Town Hall. Owners of property abutting the property on which the new facility is proposed will be notified by the Town at least fourteen days prior to the public hearing and given the opportunity to speak at the public hearing and present evidence.

D. Timely Decision. The Awarding Authority shall make a Decision on approval or disapproval of the application in a timely manner, but within no more than 180 days of the date of submittal of the application.

The Awarding Authority shall review the application, any evidence presented at a Grant of Location public hearing, and the recommendations received from the departments and make a determination on the application taking into account the recommendations received, testimony and evidence presented if any, and such other facts as it may reasonably consider such as:

- a. The likelihood that the new facility will incommode the public use of public ways or endanger or interrupt navigation.
- b. The financial and technical ability of the Applicant or Co-Locator to construct new facilities or to use the Right-of-Way.
- c. The capacity of the Right-of-Way to accommodate the proposed new facilities, modifications or attachments.
- d. The capacity of the Right-of-Way to accommodate additional new facilities if the permit is granted.
- e. Potential damage or disruption (including measurable interference with telecommunications services) to existing facilities, or public property if the permit is granted.
- f. The effect, if any, on public health, safety and welfare if the permit is granted.

- g. The availability of alternate routes and/or locations for the proposed new facilities.
- h. Applicable federal and state laws and Town by-laws which might prohibit or affect the permit if granted.

If the application is considered favorably, a Right-of-Way Permit containing such conditions and supplemental instructions as the Awarding Authority reasonably deems appropriate shall promptly issue upon the satisfaction of any conditions precedent which the Awarding Authority may establish. If the application is not favorably considered, the Awarding Authority shall communicate in writing to the Applicant or Co-Locator the reasons its application was not favorably considered.

E. Posting of Decision. Upon issuance of a decision to approve or disapprove, the Awarding Authority shall cause the decision to be posted in the Office of the Town Clerk for public review. This decision shall include the reasons for the decision and any conditions attached to said decision. A decision to grant Approval shall include an Order of Conditions which incorporates, but is not limited to the following provisions:

1. Reimbursement of all reasonable costs associated with regulatory review and oversight which were not covered by the application fees and engineering fees previously paid; insurance, and all municipal costs associated with road opening, traffic control, utility and conduit location, and utility permitting, monitoring and relocation.
2. Indemnification of the Town of South Hadley for all costs, damages, and liability associated with property damage or personal injury claims of any sort related to the project.
3. A requirement that the Applicant shall obtain permits from the appropriate departments and agencies for all project work including but not limited to road openings, network location, safety of proximate structures, road repair and resurfacing, wiring, connections, and wetland alterations and crossings.
4. A requirement that the Applicant shall make unused or vacant conduit capacity available for sale or leased use by other networks and networks developers in conformity with the provisions of this By-Law.
5. Construction must begin within sixty (60) calendar days of the date of the decision and be completed within a construction period to be specified in the Order of Conditions.

F. Grant of Location to be Included in Right-of-Way Permit. If a Grant of Location has been requested as part of the application for a Right-of-Way Permit and the Application has been considered favorably, the Right-of-Way Permit shall also constitute an order granting the location. The Grant of Location will specify

where the new facility or attachment may be placed, and (with the exception of Grants of Location for transmission lines) the kind or poles, piers or abutments which may be used, the number of wires or cables which may be attached thereto, the height to which the wires or cables may run and the maximum voltage between conductors to be carried through same. Grants of Locations for poles are limited to one pole per location. The Grant of Location may contain such other conditions and supplemental instructions as the Awarding Authority reasonably deems appropriate.

VII. TERMS OF THE RIGHT-OF-WAY PERMIT

A. Conditions of Permit. All Right-of-Way Permits granted are conditioned upon

- 1) the Applicant having obtained and submitted to the Awarding Authority, prior to construction and installation of its new facilities, a Bond as required in sub-section (K)(2) hereafter, and,
- 2) Permit holder's agreement to make any excess capacity of its facility available to other Applicants on commercially practical and technically feasible terms, and,
- 3) to the extent feasible and subject to reasonable availability and agreement between a telecommunications carrier and the Town concerning price, maintenance, access and security, interconnection of the new telecommunications facility with public buildings, and
- 4) the execution and delivery of a Town of South Hadley Right-of-Way license agreement in the form and substance satisfactory to the Awarding Authority.

B. Permit Term. Rights-of-Way Permits shall be valid for the period commencing on the date of filing of an application and ending upon the earlier to occur of: (i) the expiration of the useful life of the facility as reasonably determined by the Awarding Authority or (ii) thirty years from the date of the application. A permit holder desiring to continue to use the facility after the expiration of the permit term shall not more than 180 days nor less than 90 days before expiration of the current permit file an application with the Town for a permit as though the existing facility were a proposed new facility. Each Co-Locator must also file for a new permit.

C. Revocation of Permits. Except to the extent that a Right-of-Way Permit also constitutes a statutory Grant of Location and current law limits the ability of the Awarding Authority to revoke a Grant of Location, the Awarding Authority during the permit term may revoke a Right-of-Way Permit granted hereunder after notice and hearing if it shall reasonably determine that (i) permit holder is in default (ii) permit holder fails to construct the facilities for which a permit was granted within six months of granting of the permit (iii) permit holder has failed to relocate its

facility or attachment to a new location within the designated time following an order from the Awarding Authority to relocate such facility or attachment or (iv) if the Awarding Authority determines that public necessity and convenience requires the revocation of a Grant of Location held by a street railway. The permit holder shall be given not less than ten days prior written notice of the time and place of the hearing on revocation and shall have the opportunity at the public hearing to present evidence.

D. Removal of Facilities. Following revocation of the permit or the expiration of the permit term without an application to continue to use the facility unless then existing statutes shall require a different result and, if ordered by the Town, permit holder shall cease using the Right-of-Way. Permit holder shall remove all of its overhead and underground facilities from the Right-of-Way and restore the area to its original condition within six months following expiration of revocation of the permit. In the event that the permit holder fails to remove its facilities, the Awarding Authority may treat such as abandoned property and, among other remedies, remove the facilities and restore the area at the owner's sole cost and expense.

E. Removal of Unauthorized Facilities. With the exception of permits held by municipal departments and permits held by public utilities, within thirty days following written notice from the Town, any person or entity that owns, controls or maintains any overhead or underground facilities located within the Right-of-Way for which a permit has not been obtained and which is not a grandfathered facility shall apply for a permit and may request a hearing before the Awarding Authority and shall have the opportunity at the hearing to present evidence. If the Application for a permit is denied, Applicant shall, at its own expense, remove such facilities from the Right-of-Way and restore the area to its original condition within six months of the date of the denial of the permit.

In the event that the Applicant fails to remove its facilities, the Awarding Authority may treat such as abandoned property and, among other remedies, remove the facility and restore the area at owner's sole cost and expense.

F. Re-Location of Facilities due to Public Necessity. The location of any overhead or underground facility covered by a Right-of-Way Permit may be changed by order of the Awarding Authority if it determines in its reasonable discretion that public necessity requires relocation of the facility. Except for emergency repair work, Applicant is required to notify all Co-Locators upon receiving an order to relocate the facility from the Awarding Authority. Applicant and all Co-Locators shall, at their own expense, relocate their facilities to such location as shall have been approved by the Awarding Authority within ninety days of the receipt of the order of the Awarding Authority. Upon relocation Applicant shall

promptly supply Awarding Authority with “as built” plans of the relocated facility. Following the transfer of the facility and any attachments from the existing facility to the new facility, the existing facility shall be removed from the site within ninety days from the date of the completion of the transfer.

Unless directly and proximately caused by the willful, intentional or malicious acts by the Town, the Town shall not be liable for any damage to or loss of any overhead or underground facility located in the Right-of-Way as a result of or in connection with any public works, public improvements, construction, excavation, grading, filling or work of any kind in the Right-of-Way by or on behalf of the Town. Rights-of-Way Permits and Grants of Location for facilities that have been ordered to be relocated will be amended to reflect the new location once the facilities have been re-located.

G. Assignment of Facilities. Except in connection with a transaction to which Section 15B of Chapter 166 of the Massachusetts General Laws applies, a Right-of-Way Permit is not assignable. If a permit holders transfers ownership or use of its facilities to another entity, such entity must apply for and receive its own permit in accordance with this By-Law.

H. Non-exclusive grant. No permit granted under this By-Law shall confer an exclusive right, privilege, license or franchise to occupy or use the Right-of-Way of the Town for delivery of services or any other purposes. No permit granted under this By-Law shall convey any right, title or interest in the Right-of-Way but shall be deemed a license to use and occupy the Right-of-Way in accordance with the terms of this By-Law and the Town of South Hadley Right-of-Way license agreement. Further, no permit shall be construed as a warranty of title. A permit shall be limited to a license to use only that specific portion of a Right-of-Way as specified in the plan that accompanies the Application and in any permit or license agreement.

I. Co-Location of Facilities. Issuance of a Right-of-Way Permit is conditioned upon the agreement of the Applicant to make excess capacity available to other Co-Locators on commercially practical and technically feasible terms. All new facilities for which a Right-of-Way Permit has been issued shall be constructed, installed and located in accordance with the following terms and conditions:

1. Attachments shall be installed within existing underground or overhead facilities whenever excess capacity exists within such existing facility.

2. Whenever existing facilities have been required by the Town to be located underground within a Right-of-Way, no permit will be granted for an overhead facility.
 3. Whenever any existing facility is required by the Town for reasons of public necessity to be relocated, each Applicant owner shall relocate its facilities within a reasonable period of time and all Co-Locators who share the facility shall, absent extraordinary circumstances or undue hardship as determined by the Awarding Authority, also relocate their attachments concurrently to minimize the disruption of the Right-of-Way.
 4. Whenever new underground facilities must be constructed because the excess capacity of existing facilities has been exhausted, Applicant shall anticipate its needs for at least thirty years and is encouraged to construct new underground facilities sufficient to meet its needs for this time period as well as provide excess capacity to Co-Locators on commercially practical and technically feasible terms.
 5. The Town reserves the right to place, free of charge, signal circuits, signal supply circuits and the equipment attached to these circuits belonging to the Town and used by it exclusively for municipal purposes on or in all existing facilities with excess capacity and on or in new facilities then owned or controlled by an Applicant which is a Public Utility and shall be allowed access whenever necessary to place, maintain or remove its wires and cables.
- J. Insurance.** The permit holder shall acquire and continuously maintain while it possesses a Right-of-Way Permit liability insurance coverage on all personnel and equipment used to construct, operate, maintain and repair the overhead and underground facilities located within the Right-of-Way. This insurance must be with insurance companies licensed to do business in the Commonwealth of Massachusetts and shall contain the following coverages and be in the following minimum amounts:

Commercial General Liability Insurance – including operation, independent contractors, complete operations for a period of one (1) year from completing the Right-of-Way Work, XCU hazards, broad form property damage and personal injury.

General Aggregate:	\$ 2,000,000.00
Products and complete operations	
Aggregate	\$ 2,000,000.00
Each occurrence	\$ 1,000,000.00
Combined single limit	\$ 1,000,000.00

Automobile Liability Insurance (covers owned, non-owned and hire vehicles)

Bodily Injury Liability	\$ 500,000.00 ea. person
	\$ 1,000,000.00 ea. accident
Property Damage Liability	\$ 250,000.00 ea. accident
Combined Single Limit	\$ 1,000,000.00

Worker's Compensation and Employer's Liability

Each Accident	\$ 100,000.00
Disease – Policy Limit	\$ 500,000.00
Disease – each Employee	\$ 100,000.00

Certificates of Insurance shall provide for at least thirty (30) days notice to the Awarding Authority of cancellation or material change. The name of the municipality shall be listed as an additional insured on the Certificate of Insurance.

K. Construction Requirements

1. All permit holders are required to obtain a building and electrical permit (if applicable), and (except for poles and attachments thereto) a road opening permit from the Awarding Authority. Once commenced, construction shall proceed at an uninterrupted and consistent pace so that the Right-of-Way Work described in the permit will be completed within a reasonable time.
2. Before commencing construction, permit holders shall submit to the Awarding Authority a performance bond, with corporate surety satisfactory to the Awarding Authority, in an amount equal to the value of the construction which shall assure:
 - a. the satisfactory completion of installation and commencement of operation of the system in accordance with the terms of the permit,
 - b. the indemnity of the Town from and against any and all claims for injury or damage to persons or property, both real and personal, caused by the construction, and installation of the facilities authorized pursuant to the permit,
 - c. the satisfactory restoration of adjoining property and public property in accordance with the provisions of this By-Law.

This bond shall be maintained in force until one year after the completion of the construction work.

3. Construction of new facilities must conform to the plan accompanying the Application and to the terms of the permit and license agreement.

All Right-of-Way Work must conform to the Americans with Disabilities Act and the Architectural Access Board Regulations as currently in effect.

4. Right-of-Way Work shall comply with the following:
 - a. Working Hours. Except for emergency repair work, Right-of-Way Work shall occur during normal working hours. Permit holder must give notice of the intended Right-of-Way Work seventy-two hours in advance to the Town's Superintendent of Public Works and unless the requirement for a police detail is waived by the Police Chief of the Town, must arrange for and pay for a police detail to be present throughout the period of time that the Right-of-Way Work is being conducted.
 - b. Obligation to Locate Existing Facilities. Permit holder or contractor must inform itself as to the existence and location of all existing facilities located in the same general area as the new facilities are to be located and must confer with the owners thereof in order to obtain information as to the vertical and horizontal locations of the facilities and other conditions that might affect the Right-of-Way Work.
 - c. Non-Interference with Existing Facilities. Permit holder or contractor shall not interfere with an existing facility without the written consent of the Awarding Authority and the owner of the existing facility. If it becomes necessary to relocate an existing facility to accommodate the new facility, this shall be done by its owner and the cost of such work shall be borne by the permit holder.
 - d. Dig Safe. Permit holder shall, in accordance with Chapter 164 section 76D of the M.G.L., notify all Public Utilities seventy-two hours in advance of making any excavation in a Public Way. Such notification shall be made by means of obtaining a DIG-SAFE number. Said number shall be provided on the road opening application.
 - e. Protection of Existing Facilities. Permit holder or contractor shall adequately support and protect by timbers, sheeting, etc. all existing overhead or underground facilities which may be in any way affected by the Right-of-Way Work and shall do everything necessary to support, sustain and protect them under, over, along or across such work area. Excavation work shall be performed and conducted in such manner that it shall not interfere with access to

fire stations, fire hydrants, water gates, underground vaults, catch basins, manholes or any other public structure.

- f. Adjoining Property. Permit holder or contractor shall, at all times at its own expense, preserve and protect from injury any adjoining property and shall take such precautions as may be necessary for this purpose. Permit holder shall be responsible for all damages to public or private property or streets resulting from its failure to properly protect and carry out the Right-of-Way work.
- g. Trees. Permit holder or contractor shall not remove, even temporarily, any trees or shrubs which exist in the Right-of-Way work area without first obtaining the consent of the Town Tree Warden. In the event a tree is either accidentally destroyed by the permit holder or contractor or is authorized for removal by the Town Tree Warden, permit holder or contractor shall remove the tree, stump and debris from the work site and replace the tree with a tree meeting specifications provided by the Town Tree Warden in a location approved by the Town Tree Warden.
- h. Excavated Material. Permit holder or contractor shall remove all excess excavated material, surplus water, muck, silt, residue or other run-off pumped or removed from excavations from the Right-of-Way work site.
- i. Temporary Repairs of Underground Facilities. At the end of each day, all trenches must be plated if repair work is not completed. No un-plated trenches are permitted overnight and work in plated trenches must be continually prosecuted to completion to minimize the time trenches are plated.
- j. Noise. Permit holder or contractor shall perform the Right-of-Way work in such a manner as to avoid unnecessary inconvenience and annoyance to the general public and occupants of neighboring property. During the hours from 10:00 p.m. to 7:00 a.m. permit holder or contractor shall not use, unless otherwise specifically permitted by the Awarding Authority any tool, appliance or equipment producing noise of sufficient volume to disturb the sleep or repose of occupants of the neighboring property.
- k. Debris and Litter. The permit holder or contractor shall remove all debris and litter remaining from the Right-of-Way work site in a timely manner.
- l. Lawn Surfaces and Plantings. All lawn surfaces which are disturbed during Right-of-Way work shall be replaced with sod or

six (6) inches of screened loam, lime, fertilized and re-seeded with good quality lawn seed. Any areas containing plantings shall be restored to their original condition with the same or similar plantings.

- m. Erosion Control. Permit holder shall be responsible for all erosion control and for obtaining any necessary permits from the Town. Permit holder or contractor shall protect drainage structures from siltation by whatever means required including but not limited to the installation of hay bales and/or filter fabric. In the event that a drainage structure becomes damaged from siltation as a result of the Right-of-Way work, permit holder or contractor shall clean the structure before completing the Right-of-Way work.
- n. As Built Plans. Within 30 days following completion of construction of new facilities, permit holder shall file with the Awarding Authority complete As-Built Plans of the new facilities including an accurate map certifying the location of all facilities within the Right-of-Way prepared by a Professional Engineer registered to perform the required work in the Commonwealth of Massachusetts or other qualified professional registered to perform the required work in the Commonwealth of Massachusetts. A copy of the maps and plans must be provided in an appropriate digital format as specified by the Awarding Authority.
- o. Tree trimming. Permit holders who own and maintain overhead facilities are responsible for trimming trees or other vegetation growing in the Right-of-Way to prevent their branches or leaves from touching or otherwise interfering with the overhead facility. All trimming or pruning shall be at the sole expense of the permit holder and performed under the supervision of the Town Tree Warden. Approval by the Town Tree Warden must be granted prior to undertaking trimming of trees or vegetation within the Right-of-Way.

L. Emergency Repair Work. When notified by the Town, permit holder is required to respond to calls for emergency repair work within two hours of the notice and to commence repairs immediately upon arrival at the site.

M. Maintenance. Permit holder shall at all times employ ordinary and reasonable care and install and maintain in use nothing less than commonly accepted methods and devices for preventing failures of overhead or underground facilities and accidents which are likely to cause damage, injuries or nuisances to the public. Owners of poles shall, upon the receipt of written notice served by the Inspector of Wires, promptly

make such substitution or repairs of such poles, wires, posts, supports or attachments as may be required by the Inspector of Wires.

VIII. RENTAL PAYMENTS

A. Overhead License Rental Payments

1. The overhead license rental payment for each overhead facility shall be computed by multiplying the occupied area of the facility by the applicable overhead license rental rate.
2. The occupied area of an overhead facility shall be determined in the reasonable discretion of the Awarding Authority.
3. The overhead license rental rate shall be determined annually by the Awarding Authority within sixty days of the commencement of each fiscal year utilizing assessment data for the fiscal year just ended. The rate for the fiscal year in which an Application is filed (or the year of the effective date in the case of grandfathered facilities) shall be the applicable rate for the entire permit term.
4. An annual overhead license rate shall be calculated by:
 - (a) determining the assessed value of all taxable land in the Town for the previous fiscal year, and
 - (b) dividing the amount obtained in (a) by the total number of acres of land in Town subject to tax in that fiscal year and by expressing this quotient on a dollar per square foot basis (this represents a reasonable method to derive the value of the Town's investment in its Rights-of-Way) and
 - (c) determining in the reasonable judgement of the Awarding Authority the Town's cost of long-term capital and a reasonable capital amortization term. The combination of these two items shall be expressed as an amortization constant. (This constant represents the Town's reasonable judgment of the term over which the Town should recover its investment in its Rights-of-Way and a reasonable return on such investment) and
 - (d) multiplying the quotient obtained in (b) above by the constant determined in (c) and by expressing this product in dollars per square foot.

B. Underground License Rental Payment

1. The underground license rental payment for each underground facility shall be computed by multiplying the occupied volume of the facility by the applicable underground license rental rate.
2. The occupied volume of an underground facility shall be determined in the reasonable discretion of the Awarding Authority.
3. The underground license rental rate shall be determined annually by the Awarding Authority within sixty days of the commencement of each fiscal year utilizing assessment data for the fiscal year just ended. The rate for the fiscal year in which an Application is filed (or the year of the effective date in the case of grandfathered facilities) shall be the applicable rate for the entire permit term.
4. An annual underground license rate shall be calculated by dividing the product obtained from the calculation described in Paragraph A (4) (d) above by the useable depth of the Rights-of-Way in the Town of South Hadley as reasonably determined by the Awarding Authority and expressing the quotient so obtained in dollars per cubic foot.

C. Exemption from Rental Payments

Applicants utilizing facilities (which includes use by Co-Locators) on the terms described below shall be exempt from the payment of underground or overhead license rental payments during the periods described as follows:

1. Applicants which are municipal departments to the extent that such facilities are used only for municipal purposes are exempt from the payment of rental payments hereunder.
2. Applicants with grandfathered facilities shall be exempt from the payment of rental payments to the extent of the type and extent of the uses being made of such grandfathered facilities as of the effective date and during the period commencing on the effective date and ending on the expiration or earlier termination of the permit term.
3. Applicants with grandfathered facilities which after the effective date propose to make uses of them, or allow Co-Locators to make uses of them which are not Public Utility Uses, shall have the exemption described in sub-paragraph (2) above reduced pro-tanto as to reasonably determined by the Awarding Authority and shall forthwith begin paying a pro-tanto portion of the annual rental payment for the use of the facility no longer subject to exemption. The rental payment

shall be calculated as described above and the calculation shall utilize the fiscal year in which the Application for non-exempt use is made. The pro-tanto non-exempt portion of the annual rental payment shall be reasonably determined by the Awarding Authority by comparing the portion of the occupied Area or occupied volume subject to non-exempt use to the total occupied area or occupied volume use being made of the facility. Evidence of well-established uniform practices evidenced by written policies or procedures of Applicants in establishing pole attachment fees or other similar charges to Co-Locators or in allocating costs among affiliates shall be considered as prima facie evidence in determining reasonable allocation by the Awarding Authority.

4. Applicants with new and existing facilities which after the effective date propose to make public utility use or allow Co-Locators to make public utility use of a facility shall be pro-tanto exempt during the permit term from the payment of the appropriate annual rental payment otherwise payable with respect to such facility to the extent of its public utility use determined as set out in sub-paragraph (3) above.
5. The routine replacement of a portion of a facility or a minor adjustment of the location of part of a facility (such as the replacement or relocation of a pole or replacement of wires or cables) in situations where the use and capacity remain unchanged in some circumstances may require an Applicant or Co-Locator to file an application for a Right-of-Way Permit but in such situations the exempt status of the facility shall not be affected.
6. All exemptions except those for municipal departments shall end upon the end of the initial permit term, but in no event later than thirty years from the effective date unless then applicable law shall require a continuation of the exemption.

IX. RECORDING OF ORDERS AND DECISIONS

All orders and decisions by the Awarding Authority regarding Grants of Location, Rights-of-Way Permits, Transfers, Alterations, or any other actions authorized by this By-Law are to be recorded and posted in the Office of the Town Clerk.

X. EXPIRATION OF APPROVAL DUE TO FAILURE TO ACT

In the event the recipient of the Grant of Location, Alteration, Right-of-Way Permit, or a Transfer of a License fails to act to begin and complete the work in accordance with the time schedule set forth in the Order of Conditions, the Approval shall expire. The Applicant shall not be entitled to reinstatement of the Order of Conditions.

XI. APPEALS

A person or entity aggrieved by a decision of the Awarding Authority under this By-Law may appeal such decision to the appropriate court of competent jurisdiction or, to the extent applicable law provides, to the DTE or the FCC.

XI. SEVERABILITY

If any clause, section, or other part of this By-Law shall be held invalid or unconstitutional by any court of competent jurisdiction, the remainder of this By-Law shall not be affected thereby but shall remain in full force and effect.